No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA,
Petitioner

vs.

ROBERT FORTIER, et al

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR DEFENDANTS

Submitted jointly by

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Attorneys for Defendant Fortier

Green, Green, Romprey & Sullivan,
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INDEX

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UNITED STATES OF AMERICA, PETITIONER

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Defendants' Brief

INTRODUCTION

ON WRIT OF CERTIORARI to the United States Court of Appeals for the First Circuit to review a judgment affirming a judgment for the defendants ordered by the United States District Court for the District of New Hampshire, in a proceeding brought by the United States seeking to require the defendants to make restitution of part of the purchase price to the purchasers of two houses sold in November and December of 1947 for prices in excess of maximum sales prices established in 1946 under the Veterans' Emergency Housing Act of 1946, which act had been repealed prior to the sales in question.

The opinion of the Court of Appeals is reported at 185 F (2d) 608 (R. 54); the opinion of the District Court is reported at 89 F. Supp. 708 (R. 9).

Certiorari was granted by this Court on petition by the United States asserting in main that the decision below is in conflict with decisions of four *District Courts* and affects hundreds of other pending cases (Petition, pp. 6, 7. But see footnote 5 herein).

N. B. All record references are to page numbers of reprinted Transcript of Record.

STATEMENT OF CASE

Complaint by United States of America filed November 9, 1948, seeking mandatory injunctions compelling restitution to the purchasers of two houses of the difference between maximum sales prices set by the Federal Housing Administration and the prices charged and received on the sale of the houses on November 12, 1947 and December 4, 1947, the action being based upon Title III of the Second War Powers Act as amended, Regulation 33 promulgated thereunder, and Section 7(c) of the Veterans' Emergency Housing Act of 1946. (R. 1). The complaint was filed *within one year* after the sale in both instances.

The District Court for the District of New Hampshire denied defendants' Motions to Abate for lack of a proper party plaintiff (R. 49, 50), and denied defendants' Motions to Dismiss (R. 51-52), subject to defendants' exceptions.

The District Court likewise struck defendants' demand for a jury trial, on the Government's motion (R. 16), heard the case without a jury, and upon the Government's objection, excluded all evidence related to the equitable defenses raised by defendants' answers (R. 16, 18, 21, 31-36, 38, 39, 47, 48), subject to defendants' exceptions.

The District Court rendered its opinion, ordering judgment for the defendants, and from this judgment the plaintiff United States appealed to the Court of Appeals for the First Circuit, which affirmed the judgment (185 F (2d) 608). The District Court's judgment (R. 9-13) is based upon the premise that the express repeal of the material sections of the Veterans' Emergency Housing Act of 1946, by the Housing and Rent Act of 1947, on June 30, 1947, freed the defendants from any obligation to conform to the prior law with respect to maximum sales price limitations, in their sale of houses in November and December

of 1947, months after repeal. The Court of Appeals similarly disposed of the main issues (R. 54-59), Judge Woodbury further commenting upon whether the United States had any standing as a party plaintiff (R. 59).

STATEMENT OF FACTS

On August 21, 1946 the defendants applied for a residential construction permit under Priorities Regulation 33. They proposed to build two houses for proposed sale at $9,000 each. The application, as approved, authorized the construction of two five-room houses without garages or breezeways and established a maximum sales price of $8,350.00 on each unit so constructed. A project serial number and a preference rating HH was assigned upon the approval of the application (R. 9, 10, 14-15, 55).

The defendants had begun construction of the houses in July of 1946, and completed one house in August of 1947, the second house being completed in January of 1948 (R. 10, 15, 55). No materials used in the construction of these houses were shown to have been obtained by use of the HH preference rating obtained by their application (R. 55, 42, 43, 44). Windows costing $18 were shown to have been obtained, but they were not usable on these houses (R. 24, 25, Compare Exhibit 8 and Plans, Exhibit 5) and not shown to have been used in their construction (R. 25).

As constructed, additions were made. The first (Tasker) house included a garage, breezeway, staircase to the unfinished second floor, an extra window and lights in the attic, ceramic tile bathroom and other improvements. The second (Buckey) house included a garage, breezeway, outside entrance and stairway to the basement, three finished rooms on the second floor together with electrical fixtures, radiators, closets, windows and including a large dormer in the roof. (R. 10, 15, 21-22).

The first house was sold to a Captain Tasker, the sale price being $12,000. The second house was sold to a Major Buckey,

the sale price being $12,800.

Mr. Baker, one of the F.H.A. representatives, inspected the construction in progress, noted the additions being built, but made no complaint to the defendants (R. 22). The houses were inspected and appraised by an appraiser for the Veterans Administration as having value for loan purposes of $11,100 and $12,500 respectively before the respective sales, (See R. 39, 55).

Construction costs increased at least 20 to 25 per cent during the period of construction of the houses (R. 21, 36). Offers of proof that the defendants made no profit on the construction or sale of the houses, and in fact suffered financial loss were rejected. (R. 38-39, see 47-48).

The Second War Powers Act and the Veterans Emergency Housing Act of 1946 had been repealed prior to both sales.

ISSUES OF LAW PRESENTED[1]

I

Can the Housing Expediter continue in effect a regulation imposing maximum sales price restrictions upon housing sold after June 30, 1947, after Congress expressly repealed all statutory authority for the regulation on June 30, 1947? We submit that no executive agency can thus extend a repealed law.

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[1]This case came to the Circuit Court of Appeals on the Government's appeal alone, only because the defendants, not being aggrieved by the judgment below in their favor, could not cross-appeal under the rule of **Electrical Fittings Corp. v. Thomas & Betts Co.**, 307 US 241, 83 L. ed. 1263, 59 S. Ct. 860; **Harding v. Federal Nat'l Bank**, 31 F(2d) 914, and **Chapman v. King**, 154 F(2d) 460. The defendants, however, in an effort to prevent further harrassment by the Government, included in the record their own objections to the proceedings below and with leave of the Court argued those matters without cross-appeal under the rule of **Morley Constr. Co. v. Maryland Casualty Co.**, 300 U. S. 185, 81 L. ed. 593, 57 S. Ct. 325, rehearing denied 300 U. S. 687, 81 L. ed. 888 57 S. Ct. 505. With leave of the Supreme Court the defendants desire to similarly argue the issues here.

If our contention above is not accepted, in order that the defendants not be required to litigate endlessly upon this controversy, we reach two subsidiary issues which we argue, alternatively, assuming a cause of action is stated in the complaint.

II

The complaint should be abated for lack of a proper party plaintiff because brought at a time when the purchasers only had a right to bring suit, and, if not so abated:

III

In any further trial if the proceeding is an action for damages for breach of contract the defendants are entitled to a jury trial, and if it is a proceeding in equity the defendants are entitled to present their equitable defenses.

ARGUMENT

I

AN EXECUTIVE AGENCY CANNOT CONTINUE TO ENFORCE A REGULATION AFTER THE STATUTORY AUTHORITY FOR ITS PROMULGATION HAS BEEN REPEALED; THAT IS WHAT IS ATTEMPTED HERE, AND THE CIRCUIT COURT PROPERLY AFFIRMED THE DECISION OF THE DISTRICT COURT ORDERING JUDGMENT FOR THE DEFENDANTS.

The Government bases its complaint on an alleged violation of Priorities Regulation 33, originally promulgated under the

Second War Powers Act, and brings its action to enforce compliance with the Veterans' Emergency Housing Act of 1946.

The genesis, life and death of Priorities Regulation 33 is a long and confused story which has been commented on at length by the Federal Courts. *See, Woods* v. *Bauhan,* 84 F. Supp. 243, 244-248; *and U. S.* v. *Alterman,* 70 F. Supp. 734 (1947); see also, Commerce Clearing House's Reconversion Service at paragraph 31,021. Regulation 33 was of necessity based originally on Title III of the Second War Powers Act, and was adopted and continued in effect under the Veterans' Emergency Housing Act of 1946.

The regulation, at various times, covered various things. If we view it as it existed in August 1946 when the defendants procured their preference rating and authorization to build, it *then* covered *four* aspects of housing:

1. It *established rent ceilings* for new construction and conversion units.
2. It *established veterans' preference* procedures.
3. It *authorized maximum sales price regulation* for new construction built with priorities assistance.
4. It *established priorities and allocation* procedures to encourage production of scarce materials and to canalize their use in construction.

Let us consider which of the four phases of Regulation 33 were still in effect in November and December of 1947 when the sales involved in this case took place, by considering what statutes were then in effect on which Regulation 33 could be based, and by reviewing the de-control situation surrounding the passage of the Housing and Rent Act of 1947:

(a) The Second War Powers Act was repealed effective June 30, 1947.

In the "First Decontrol Act of 1947" (Laws of 80th Congress,

1st Session, Public Law 29), *approved March* 31, 1947, the Second War Powers Act was amended so that:

> "Except as otherwise provided by statute enacted during the first session of the Eightieth Congress on or before this section as amended takes effect, titles I, II, *III*, IV, V, VII and XIV of this Act . . . shall remain in effect only until March 31, 1947, except that such title *III* . . . shall remain in force until June 30, 1947, for the following purposes . . . "

The excepted purposes were entirely for *"allocations"* of specified critical materials not material in this case.

Thus ended, on March 31, 1947 (or on June 30, 1947) all authority for the enforcement of Regulation 33 which might be based on the Second War Powers Act, which in fact was the authority for its original promulgation prior to the enactment of the Veterans' Emergency Housing Act of 1946 (Laws of 79th Congress, Second Session, Public Law 388). The regulation must thereafter rest, if on any statutory authority, on Public Law 388.

(b) What the Veterans' Emergency Housing Act of 1946 had previously provided:

Public Law 388 (hereinafter called the 1946 Act) was a temporary statute and it included in its purposes the following objectives:

> " . . . To overcome the serious shortages and bottlenecks with respect to building materials, to expedite the production of such materials, to allocate them . . . to accelerate the production of houses with preference for Veterans of World War II *and at sales prices* or rentals *within their means.* * * * Accomplishment of these objectives will assist returning veterans to acquire housing *at fair prices,* . . . "(Section 1(a))

Section 1(b) provided that the Act and regulations issued under it terminate on December 31, 1947 "or upon the date specified in a concurrent resolution" of the two Houses of Congress declaring its provisions no longer necessary, "whichever date is the earlier".

Section 2(a) created the office of Housing Expediter, and subsequent subsections outlined his functions and powers.

Section 3(a) specifically gave the Expediter the power to *"by regulation or order establish maximum sales prices for such housing."* Section 3(b) specifically outlines the procedures by which this price shall be established and provides for the inclusion of a specific *"margin of profit"*, and Section 3(d) specifically gives the Expediter authority to issue regulations.

Section 4 deals with an entirely different group of powers—the powers to "by regulation or order *allocate or establish priorities for the delivery of . . . materials or facilities . . .*"

Section 5 provided that sales above maximum sales prices should be unlawful, that violations of regulations or orders should be unlawful and further provided:

> "Notwithstanding any termination of this Act as contemplated in Section 1(b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, *as to rights and liabilities incurred or offenses committed prior to such termination date,* for the purpose of sustaining any proper suit . . . with respect to any such right, liability, or offense."

Section 7(a) authorized compliance suits in an "appropriate" court by the Expediter. Only in criminal actions was the Attorney General authorized to bring suit in the name of the United States, under Section 7(b). The purchaser of a house at more than the maximum sales price was given a right to sue for restitution for one year by Section 7(d), but power was denied to

the Expediter "to bring an action on behalf of the United States within one year from the date of the violation if the buyer fails to bring an action" for such restitution, by Senate elimination of such a provision in the original bill. (*See* H. R. No. 2000, May 10, 1946, in Appendix 60 Stat 207).

Whether under that Act the defendants would have been liable *to the purchasers* of the houses in a suit properly instituted by them under 7(d) or to the Expediter in a suit properly instituted by him under 7(a) are not questions involved here. Neither of those possible parties are parties to this action. Hence our motion to abate.

(c) The Veterans' Emergency Housing Act of 1946 was repealed June 30, 1947:

The provisions of the 1946 Act set forth above were expressly repealed *on June* 30, 1947 by the Housing and Rent Act of 1947 (Laws of 80th Congress, First Session, Public Law 129). Section 1 of the 1947 Act provided:

> "Sections 1, 2(b) through 9, and Sections 11 and 13 of Public Law 388, Seventy-ninth Congress, *are hereby repealed . . . Provided*: That any allocations made or committed, or priorities granted for the delivery of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and *before the date of enactment of this Act*, with respect to Veterans of World War II, their immediate families, and others, *shall remain in full force and effect.*"

Title I of the 1947 Act thereafter establishes veterans preferences in the purchase and sale of housing, *but without reference to maximum sales prices* and without providing for any cause of action for noncompliance; Title II establishes rent controls with maximum rents, and provides for actions to recover excessive rent charges, etc., *but without reference to maximum sales prices.*

It seems clear from a reading of the two acts that the enactment of the 1947 act completely removed the power of the Expediter to enforce maximum sales price regulation after June 30, 1947. The only saving clause in the 1947 Act is that set forth above and which appears in Section 1. That clause protects allocations of materials made or committed or priorities granted *under Section* 4[2] of the 1946 Act for the production of housing for veterans. It does not continue in effect the regulations under which those allocations and priorities were granted.

As we view this clause, it was inserted to insure that critical materials already produced through priorities assistance and allocated to the veterans housing program not be diverted from that program. Under the new 1947 law veterans' preference provisions were still in effect. The only change accomplished by the 1947 Act affecting the situation involved in this case was to remove, by express legislation, the maximum sales price restrictions made possible by the 1946 Act.

If it had been the intention of the Congress to repeal the law but to leave the regulations promulgated under it in effect—including Regulation 33—this could have been done to a limited degree, as was done in other instances. Thus, the 1946 extension of the Emergency Price Control Act revived lapsed regulations in this apt language: " . . . all regulations, orders, price sched-

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[2]The Government brief in this Court presents a novel new theory for the first time: that price control on housing was not regulated under Section 3 which did authorize such control, but under Section 4 which did not. (See brief pages 11, 12, 15, 18-19, 20). Only the statements arguendo in the brief are cited as authority for this concept. We do not attempt to counter with such ex parte statements of facts unsupported by evidence. A comparison between the language of Section 3 and the pricing provisions of PR33 and HEPR 5, together with HEPO 1 (11 F. R. 9507) seem to us to indicate clearly that the Expediter relied upon his own statutory authority in Section 3 to control sales prices. However, both Sections 3 and 4 were repealed on June 30, 1947, so we would respectfully submit that the regulation of prices could not survive even under the Government's new argument.

ules and requirements . . . shall be in effect." *See, Cobleigh* v. *Woods,* 172 F(2d) 167, 168. Similarly, upon extension of the Sugar Control Act by the Sugar Control Extension Act of 1947, Congress expressly provided that "Every order, directive, rule or regulation is continued in force." *See, Bowen* v. *U. S.* 171 F(2d) 533, 534.

That is not what was done here. The saving clause in the Housing and Rent Act of 1947 does not even say that all regulations relating to priorities or allotment of materials survive—the allotments and priorities only are recognized and saved; the regulations themselves fell with the repeal of the Act on which they depended.

(d) The Housing Expediter interpreted the 1947 repeal precisely as the defendants now argue, at the time of the repeal in 1947.

We contend that after June 30, 1947 by virtue of the repeal of the 1946 Act and the enactment of the 1947 Act, the Housing Expediter had the power to enforce, by Regulation 33 or otherwise, only *two* of the *four* types of control previously enforced—rent control and veterans' preference regulation. Apparently the Expediter so viewed the situation *at that time*:

On July 3, 1947 the following amendment to subsection (g) of PR33 (upon which this action is based) and to subsection (h) was issued, effective as of June 30, 1947 (12 F. R. 4434):

"1 Add the following subsection at the end of paragraph (g):

(9) *Effect of Housing and Rent Act of* 1947.

"The requirements of this section with respect to the establishment or maintenance of *maximum rents do not apply* to any housing accommodations the construction of which is completed on or after February 1, 1947 (or to the additional housing accommodations created by conversion on or after that date) *unless such accommodations are being rented to a veteran of World War II or his immediate family who, on June* 30, 1947, *either*:

(i) *Occupied* such housing accommodations, or,

(ii) *Had a right to occupy* such accomodations, or,

anytime *on or after July* 1, 1947, *under any agreement whether written or oral.*

"In addition, the requirements of this section with respect to maximum rents shall not apply *after June* 30, 1947 to any housing accommodations which are not in a defense-rental area under rent control pursuant to Title II of the Housing and Rent Act of 1947.

"2. Add the following subparagraph at the end of paragraph (h):

(6) *Effect of Housing and Rent Act of* 1947.

"The veterans preference requirements of this section shall not apply to any housing accommodations which were completed after June 30, 1947. The veterans' preference requirements applicable to such accommodations are contained in the Veterans' Preference Regulation (12 FR 4265). For the purpose of this subparagraph, the time at which construction of housing accommodations shall be deemed to be "completed" shall be the date on which the dwelling is first suitable for occupancy and all utility and service connections have been made . . . "

"3. This amendment shall become effective on June 30, 1947, simultaneously with the approval by the President of the Housing and Rent Act of 1947."

At the same time a new Veterans' Preference Regulation was promulgated with this interesting introductory language (12 F. R. 4265):

"§ 813.1 *Veterans' Preference Regulation—*

(a) *What this section does.* This Section (Veterans' Preference Regulation) explains the preference given to

veterans and their families by the Housing and Rent Act of 1947 *in the sale* or rent *of housing accommodations completed between June* 30, 1947 *and March* 31, 1948. Among other things, it determines the manner in which such housing accommodations shall be publicly offered in good faith for sale or rent to veterans and their families.

"The veterans' Preference requirements for housing accommodations completed on or before June 30, 1947, *continue as provided in Priorities Regulation* 33, Housing Expediter Priorities Regulation 5 and the Housing Permit Regulation, whichever is applicable."

In these two amendments the Expediter was adapting his regulations to the 1947 Act, and, we contend, he amended the regulations only with respect to those parts of PR33 which were still effective under the 1947 Act. He expressly recognized that veterans' preference provisions of PR33 applied only to houses *completed* prior to June 30, 1947, the effective date of the repeal of the 1946 Act. He expressly recognized that the rental decontrol features of the 1947 Act took effect as of June 30, 1947. How then, can the United States take the position that the *repealed price control* features continued effective after June 30, 1947?

The Veterans' Preference Regulation issued under the 1947 Act provides a complete and detailed outline of the procedures to be followed in sales of houses completed after June 30, 1947. The same procedures as were provided in PR33 were re-promulgated *with deletion of the sales price restrictions*—consistently with the 1947 Act which deleted the statutory authority for price restrictions. These houses were subject to the new regulation, which was not violated: that regulation specifically states that PR33 applies only to houses *completed* prior to June 30, 1947.

"(e) The administrative situation when the 1947 Act was considered and passed clearly indicates that Congress did not intend the 1947 Act to be construed as the Government now argues.

When the Veterans' Emergency Housing Bill of 1946 was proposed, it was purely as a temporary measure, and it was proposed that it expire by its own terms on June 30, 1947. It was thus passed by the House, and the termination date was extended by the Senate to not later than December 31, 1947, unless sooner terminated by Congressional action, presumably on Mr. Wilson Wyatt's suggestion. *See, Hearings before a Subcommittee of the Committee on Banking and Currency, U. S. Senate,* 79th Congress, 2nd Session, on H. R. 4761, p. 100; *U. S. Code Congressional Service,* 79th Congress, 2nd Session, 1946, pp. 1178, 1182. As the record of the Senate hearings reveals, the primary purpose of the enactment was to stimulate production of finished building materials by premium payments to manufacturers, with allocation of raw materials to those manufacturers. Restrictions on the amount and types of building construction were already in effect, and were continued. Sales price restriction was a separate aspect of the bill.

When the 1947 bill, later to become the Housing and Rent Act of 1947, was proposed, Mr. Foley, National Housing Administrator, *part* of whose colloquy with Congressman Monroney is set forth in appellant's brief at pages 29 and 30 (But see, *Schwegmann Bros.* v. *Calvert Distillers,* 95 L. ed. Adv. 684, 688, 689, 691) was *not* charged with administration of maximum sales price regulation—Mr. Frank Creedon, as Housing Expediter, *was.* Since Mr. Creedon was the chief administrative proponent of the new legislation, we set forth the following testimony of Mr. Creedon, given on March 18, 1947, at *Hearings before the Committee on Banking and Currency, House of Representatives,* 80th Congress, 1st Session, 1947, on H. R. 2547 (italics added):

"My first actions as Housing Expediter were to remove those controls which no longer served an effective purpose * * * *all price ceilings on houses to be built in 1947 were dropped.*" (p. 36) * * *

"As you know, I came into the program on December 15, [1946] *after building materials were decontrolled*" (p. 43). * * * .

"Mr. McMillen: You are fixing the sale price of these houses that are being built, are you not?

Mr. Creedon: *No, we cut all sales prices loose on December* 24.

Mr. Gamble: The only limitation now is the number of square footage; is that right?" (p. 51) * * *

Mr. Creedon: " * * * Of course, *all priorities on building materials*—I mean the issuance of them—*stopped on December* 24, 1946. Then, if the Government had a contract, so to speak, between those builders, the Government said, "we will give you a priority," and we feel that we have to carry out our end of that contract, so *we have given them until March* 31, [1947], *the end of this month, to extend those priorities, and then there will not be any more.*

Mr. Cole: Then the *priority system is practically eliminated at the present time?*

Mr. Creedon: *It was eliminated on December* 24, 1946, but we had to keep our end of the bargain and gave them a reasonable time to use them. We set March 31, *and if they do not get them in by March* 31, *then, they are valueless.*" (p. 55) * * *

"In the case of sale housing . . . You do not have to submit any plans, so far as the government is concerned, and you just sign a statement to the effect that your house will not exceed 1,500 square feet of floor space; that

you will limit it to one bathroom, that the house is for year-round occupancy, and that in the sale you will conform to veterans' preference." (p. 62) * * *

Mr. Banta: "[You can hear plenty of bad news on] the effect which *allocation of materials* had, which, of course, *you now say has been discontinued entirely, the priority allocation.*

Mr. Creedon: Yes, the priorities ceased December 24, *but we are continuing with the raw materials.* (p. 66)

Mr. Banta: Now to what extent is any of the scarce building material now controlled? Is there price control on it? Soil pipe, for instance?

Mr. Creedon: No, there is no price control." (p. 66)

* * *

Mr. Banta: *"There is no allocation of the finished product,* though, to dealers?

Mr. Creedon: *No, sir."* (p. 66) * * *

Mr. Banta: *"There are no price controls in effect regarding any building or construction material now?*

Mr. Creedon: *No, sir."* (p. 67)

Here is the picture Congress had when it passed the Housing and Rent Act of 1947:

(1) Price control of building materials had ended on November 9, 1946—see Hearings, above cited, at page 608.

(2) Maximum sales price control of new housing had been abandoned by the executive branch of government on December 24, 1946, since it was manifestly impossible to control prices of finished houses, when the materials going into them were being sold on an unrestricted market.

(3) The priorities system, as it related to building contractors such as the defendants, had been abandoned on December 24,

1946, except that priorities granted prior to that date were supposed to have been effective until March 31, 1947.

(4) After March 31, 1947 priorities previously granted were "valueless," and housing uncompleted on that date was to be completed without priority assistance, the materials necessary being available, if at all, in an uncontrolled market.[3]

After hearing this testimony, and further testimony that allocation and priority authority with respect *only* to production of finished building materials from raw materials was still necessary (Hearings, pp. 38,-56-62), the House voted to repeal the whole of the 1946 Act, with the provision in Section I of the new 1947 Act protecting only allocations and priorities previously made. The Senate amended the bill to temporarily continue the office of Housing Expediter, but only for the purpose of administering rent control and to liquidate the existing obligations of the Government with respect to market guarantee agreements and premium payment regulations. *U. S. Code Congressional Service,* 80th Congress, 1st Session 1947, p. 1237 et seq.

We say this situation indicates that Congress intentionally and knowingly omitted any reference to maximum price control over new housing in the 1947 Act. "It is fair to say that in all this, Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected." *Universal Camera Corp.* v. *N.L.R.B.,* 95 L. ed. Adv. 305, 312.

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[3]The Government, by footnote at page 21 of its brief, cites references indicating that priorities could be extended further, but only to June 30, 1947, when the 1946 Act expired. This reinforces our argument that after that latter date, no continuation of control was then contemplated. As the Court below pointed out (R. 55) priorities had become valueless after prices of materials were decontrolled on November 9, 1946, before construction of these houses was substantially started.

(f) The case law.

The better reasoned cases do not support the Government's position that enforcement of this statute can be continued beyond its express repeal; the District Court cases which reach the result contended for by the appellant are bad law and should not be approved here. The several cases relied upon by the appellant Government may be divided into the following groupings:

U. S. v. *Duke Bldg. Corp.*, 79 F. Supp. 681; *U. S.* v. *Elade Realty Corp.*, 157 F(2d) 979; *Cantrell* v. *Golden Crest Homes, Inc.*, 77 N. Y. S. (2d) 519 (Queens City Ct.-1948); *Keele* v. *U. S. and Woods*, 178(2d) 766; and *U. S.* v. *Carter*, 171 F(2d) 530, are all cases involving violations of the Veterans' Emergency Housing Act of 1946, or prior statutes, by sales of new housing at prices in excess of maximum sales prices previously set, the sales taking place while the 1946 Act was still in full force and effect—i.e., prior to June 30, 1947—but the litigation beginning thereafter. None are authority for the appellant's position. Those cases, as said in the *Carter* case, present a question, "whether the Housing and Rent Act of 1947 . . . took away the remedy whereby the Government could maintain an action to secure *restitution of overcharges that had been made while the* 1946 *Act was in full effect*" and generally hold that "*penalties and liabilities accruing while an act was in effect* may be enforced after its repeal." We do not argue against the result reached in these cases, in view of the express statutory language contained in 1 U. S. C. 109. See, *Talbot* v. *Woods*, 164 F(2d) 493; *Ebeling* v. *Woods*, 175 F(2d) 242.

Katz v. Litman, 89 F. Supp. 706; and *Pruitt* v. *Litman*, 89 F. Supp. 705, present borderline cases. In these cases some express contractual obligation existed between the buyer and seller *before* repeal of the 1946 Act, the actual conveyance (or sale) was consumated *after* repeal, and the buyer (not the Government) was complaining against the seller for violation of maximum sales

price restrictions. Without any detailed consideration of the law, and without any citation of pursuasive authority, the District Court for the Eastern Division of Pennsylvania found liability to exist.[4]

We disagree with the result reached in these cases. While it may be arguable that the contractual arrangements entered into while the 1946 Act was effective created a "liability" existing prior to the termination of the act, that conclusion does not convert an executory contract to sell into a *"sale"*, which is the act prohibited by the regulations and which is the only act giving rise to a cause of action by the purchaser under Section 7(d) of the 1946 Act. The Court essentially holds that by agreeing to do a prohibited act a "liability" *to do* the act, rather than to refrain from doing it, is created. With more reason it might be held that whomever entered into such an executory contract had violated Section 5 which made it unlawful to "solicit, attempt, offer or agree to make any such sale." Punishment for such a violation would presumably be the sanctions of Section 7(a) and (b), but not Section 7(d) which gave a cause of action for "selling", and not for agreeing to sell.

These cases, however, are distinguishable from the instant case and are properly classified, in our opinion, with the prior group of cases where violations (sales) were properly held to have taken place while the 1946 Act was still in effect.

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[4]The facts of **Pruitt v. Litman** are of interest:

Defendants procured priority assistance on May 22, 1946, and a maximum sales price of $9,200 was established. On June 16, 1947 defendant signed an agreement to sell for $10,750, and accepted earnest money. On August 1, 1947 payment was made and a deed passed. Plaintiff lived in the premises until July of 1948, whereupon she sold the premises for $11,500 making a profit of $750. She thereupon sued Litman and received a judgment of $1,550 plus counsel fee of $200, making a total net paper profit of $2,500 on the transaction, in addition to occupying the new house for almost a year. The decision does not indicate whether the judgment was granted in the name of equity.

Appellant cites and relies on *Nesseth* v. *Creedon,* 80 F. Supp. 269, a case not in point and not decided upon any ground applicable here. That case involved a maximum price increase asked for *before repeal* of the 1946 Act and is governed by the *Talbot* case rule; contracts to sell were in existence *prior to repeal,* as in the *Katz* and *Pruitt* cases, but were not the basis of decision; no ruling is made in the Nesseth case on the question presented here—whether the 1947 Act terminated maximum price restrictions under PR33—since that Regulation was not involved, and the decision rests upon a ruling that the plaintiffs were not entitled to raise the question.

Finally, appellant cites and relies on *Rheinberger* v. *Reiling,* 89 F. Supp. 598, a District Court case apparently on all fours with the instant case, and which, *in a suit instituted within the statutory time limitation by the purchaser* of the house, sustains the theory of liability upon which the government relies here. The case is unquestionably contra to the opinion below in this case. We submit, however, that the opinion in the instant case is proper, and that the *Reiling* case rule should not be approved.

In the *Reiling* case, plaintiff, a practicing lawyer, signed an earnest money contract to purchase a house for $11,700 on November 28, 1947. The house had been covered by a maximum sales price set on May 13, 1946, under PR33 at $8,400. On December 4, 1947, defendant applied for a maximum sales price increase from $8,400 to $11,700. This request was never acted upon. Plaintiff took possession on January 3, 1948 and title closing was on January 20, 1948. Prior to completion of this trade, the plaintiff, in December of 1947 demanded that the property be conveyed to him at the maximum sales price ($8,400), whereupon defendant offered to pay back his earnest money and call the deal off. The plaintiff refused, and said he wanted the house.

Here, the inequities of the "agreement to sell equals a sale"

theory came into full flower. The plaintiff *insisted* that the defendant was obligated to convey to him, because of an illegal contract. He refused to permit the defendant to rescind the illegal contract. And, when the contract was performed, he sued for a monetary recovery based upon the illegality which he previously insisted did not vitiate the contract! The District Court in Minnesota, in the name of equity, granted a judgment permitting the plaintiff to recover.

We say that this decision is both bad law and bad equity.

In essence, the Government's position is that language contained in Sections 1(b), 3, and 5 of the 1946 Act, *although those sections were expressly repealed by Section 1 of the 1947 Act,* remained the law of the land until the Housing Expediter, in his greater wisdom, repealed them. The Solicitor-General so argues at pages 11-12 of its Brief. He does not similarly argue, although implicit in his case, that Section 7 of the 1946 Act likewise survived its express repeal.

We submit that this Court should reject this fallacious argument and we commend to the Court's attention the reasoning of Judge Delehant of the District Court of Nebraska in *Creedon* v. *Stratton,* 74 F. Supp. 170, 180, 181-182, and the statement of the District Court in *Woods* v. *Griffin,* 90 F. Supp. 1017 at 1019:

> "An administrator cannot regulate matters expressly taken or removed by Congress from his supervision. As was said by the Court in *Prince* v. *Davis,* City Ct. 87 N. Y. S. (2d) 600 on page 604: '(4, 5) No one disputes the authority of the Housing Expediter to issue the necessary regulations to effectuate the statute, but clearly such regulations can only relate to property which is subject to control by Act of Congress. The Housing Expediter may not legislate and he may not enact regulations so as to

bring within administrative action that which Congress has chosen to specifically exempt." (1019)

See also, Talbot v. *Woods,* (ECA-1947) 164 F(2d) 493; *Standard Kosher Poultry, Inc.* v. *Clark,* E. C. A. 1947, 163 F(2d) 430; *compare, Herman* v. *Woods,* (E. C. A. 1949) 175 F(2d) 781, 786; *Woods* v. *Gochnour,* 81 F. Supp. 457 (E. D. Wash., 1948).

As this Court said in *United States* v. *Moore,* 95 L. ed. Adv. 431 at 434, referring to comparable provisions in the 1947 Act, Section 5 of the 1946 Act "provides for the survival of rights and liabilities incurred *prior to the expiration of the title* on either the date specified by Congress in the Act or such date as . . . Congress might later determine." Here Congress later determined to and did repeal the title upon which this proceeding is based, prior to the occurrence of the act relied upon as violations. Neither the "violations" nor suit preceded this express repeal.

We urge upon this Court the decisions below in this case, *U. S.* v. *Fortier,* 89 F. Supp. 708, aff'd 185 F(2d) 608; *U. S.* v. *Duvarney,* (D. C. N. H. unreported), aff'd 185 F(2d) 612, petition for certiorari pending in No. 15 this Court; *Sedivy* v. *Superior Home Builders,* 188 F(2d) 729 (CCA-7); and *U. S.* v. *C. B. S. Construction Co.,* 93 F. Supp. 664, appeal pending, CCA5, No. 13,455, as sound law. As Chief Judge Magruder, after discussing the 1946 and 1947 Housing Acts said in this case at 185 F(2d) 608:

> "It seems clear that the United States cannot base its present suit on the last sentence of Section 5 of the Veterans' Emergency Housing Act, which was thus repealed on June 30, 1947, prior to the sales of the houses in question. * * * Having repealed the Veterans' Emergency Housing Act of 1946, it is significant that Congress addressed itself specifically to the problem of veterans' housing, in the Housing and Rent Act of 1947. * * * If Congress had

further intended to keep in force for the future any maximum selling prices which had theretofore been imposed under Priorities Regulation 33, it would have been natural to express such intent in the proviso to Section 1(a) which repealed the Veterans' Emergency Housing Act of 1946, the statutory basis for Priorities Regulation 33".

II

THE COMPLAINT SHOULD BE ABATED FOR WANT OF A PROPER PARTY PLAINTIFF.

For the purpose only of this argument we assume that a cause of action is shown by the allegations of the complaint, and that those allegations are supported by evidence. Is the United States a proper party plaintiff?

In the *Cantrell, Katz, Pruitt,* and *Rheinberger* cases, the plaintiffs were the "persons who" bought the houses involved, bringing their action under Section 7(d) of the 1946 Act, "within one year from the date of the occurrence of the violation," extended by Section 109 of Titles 1, U. S. Code.

There are many other cases in which, after the expiration of the one year limitation on the purchaser's action and while he was enforcing the provisions of an existing statute or seeking to enforce liabilities incurred while the statute *was* previously in effect, the Housing Expediter (or the United States under Executive Order No. 9842) was allowed to maintain an *equitable* action seeking restitution as "an other order" which might be entered upon *his* application under Section 7(a) of the 1946 Act, under the rationale of *Porter* v. *Warner Holding Company,* 328 US 395, 66 S. Ct. 1086, 1091, 90 L. ed. 1332. See, *United States* v. *Allied Oil Company,* 95 L. ed. Adv. 482; *United States* v. *Moore,* 95 L. ed. Adv. 431 and cases cited at 434.

Here, without excuse that the action is necessary or appropriate to enforce past, present, or future compliance with any existing

law of the United States, the United States, not being a party in interest, brings suit for the sole benefit of Messrs. Tasker and Buckey. The purpose of the action as set forth in paragraph 4 of the complaint (R. 1) is illusory and fictitious, as the opening statement (R. 16, 17) clearly indicates.

Under Section 7 of the Veterans' Emergency Housing Act of 1946 Congress expressly provided that

(a) The Housing Expediter may institute compliance proceedings seeking injunctive relief "or other order" against sellers of houses at above maximum prices;

(b) The United States may institute criminal proceedings to punish wilful violations;

(c) The purchaser of a house may, *within one year of the date of sale,* bring an action to recover any excess over a maximum sales price, plus attorneys fees and costs.

The Act as originally passed by the House, would have permitted the Expediter in the name of the United States to sue for restitution within a year if the purchaser failed to do so (as was done here by the U. S. Attorney), but this provision was eliminated by a Senate amendment accepted by the committee of conference report on the bill. See H. R. 2000, May 10, 1946, *supra.* Nevertheless the U. S. Attorney brings such an action asking only that restitution be ordered paid to third parties.

Mr. Justice Fuller, in *Curtner* v. *United States,* 149 US 662, 37 L. ed. 890, states the general law which prevents the United States from thus engaging in barratry and maintenance as follows at 149 US 672, quoting from *United States* v. *San Jacinto Tin Co.,* 125 US 273, 285. 31 L. ed. 747, 751:

> "' * * * if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any

obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

'In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. Of course this interest must be made to appear in the progress of the proceedings, either by pleading or evidence, and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail.'"

We suggest that a close analogy to the present case may be found in *United States* v. *Waller*, 243 US 452, 61 L. ed. 843, wherein the Government paternally instituted suit for certain Chippewa Indians to secure cancellation of deeds obtained from them by fraud, after Congress had emancipated those Indians. Of course, Veterans of World War II were not specifically made wards of the Federal Government by the Veterans' Emergency Housing Act of 1946—but the same paternalistic concern is here shown. In the *Waller* case the court recognized the right of the United States to sue as guardian to protect the rights of its Indian wards, but also gave effect to the emancipation enactment, saying (243 US 462):

"In this view of the legislation and the particular act in question, we are unable to find any authority in the United States to maintain this suit in behalf of the Indians named."

See also, LaMotte v. *United States*, 254 U. S. 570, 575, 65 L. ed. 410, 412, and cases cited, in which the rationale that permits the United States to maintain suit for those in a "state of tribal dependence" is further commented upon and applied.

In *United States* v. *American Bell Telephone Co.*, 167 US 224, 42 L. ed. 144, the Court recognized the power of the United States to maintain suit in which it had no pecuniary or proprietary interest in limited situations which may appear more akin to the instant case and that decision at 167 US 264-267 may give some meagre support to the Government's position on the *general* law applicable here, except that here, as in the *Bell Telephone* case, the facts do not support the theory. The *Bell Telephone* case decision goes on however, at 167 US 267-269 to point out that even if such a general power to sue "in the discharge of its obligation to protect the public" or because "it owes a duty to other [citizens] to secure to them the full enjoyment of . . . rights which has conferred," does exist, still the failure of Congress expressly to provide statutory authority for the suit is pertinent—

> " . . . the failure so to do may be evidence that Congress thought the government ought not to interfere, and because it believed it had made ample provision for securing the rights of all without the interference of the government."

The Seventh Circuit, in *United States* v. *Allied Oil Corp.*, 183 F(2d) 453, applied this reasoning in affirming the dismissal of a suit brought under the identical provisions of the Emergency Price Control Act of 1942 after the United States was substituted as plaintiff. This Court's reversal of the *Allied Oil* case in 95 L.ed. Adv. 482 *assumes* the existence of the public right or interest being furthered by the suit, and upon such an assumption the decision may be proper. In the instant case, however, no such assumption can validly be entertained: the act complained of was violative of no law and no policy of the United States existing at the time of its occurrence.

See also Bowles v. *Wilke*, 175 F(2d) 35 and cases cited therein (CCA 7), cert. denied 338 US 861, 70 S. Ct. 104; *Defense Supplies Corp. and RFC* v. *Laurence Warehouse*, 336 U. S. 631; 69 S. Ct. 762.

We would invite to the Court's attention that the *Warner Holding Company* case rule, as originally announced, did not undertake to rule that the United States could seek to compel restitution in a proceeding entirely divorced from its obligation to enforce compliance with provisions of its laws. Properly interpreted, that decision accords with the general rule as announced in *United States* v. *Beebe,* 127 U. S. 338, approved in the *Curtner* case, *supra.* Thus such a suit, *after* the purchaser's right of action is barred, while violations by the defendant continue, and while the law remains in effect, may be reasonably calculated to induce future compliance by the defendant and also by others to whom the defendant becomes an example as held in *U. S.* v. *Moore,* 95 L.ed. Adv. 432. Where the defendant is no longer engaged in activities subject to control, and is therefore not currently violating the law (which is the situation here), and when no one else is subject to the law because the law is no longer in effect (which is the situation here), the proceeding is not at all related to compliance. It then becomes either a proceeding to exact a penalty for supposed past violation of law (*Bowles* v. *Barde Steel Co.* 177 Or. 442, 164 P(2d) 692, 162 ALR 328), or a bald attempt to litigate for the sole benefit of third parties in matters concerning which the United States has no interest, obligation, or duty. Since the Government denies an intention to penalize, it admits its maintenance. Since the purchasers *still had a right to sue* when this complaint was filed for them by the Government, there can be no doubt that this suit by the Government is likewise unnecessary, if viewed as protective of the purchasers' possible rights.

The complaint should be abated for want of a proper party plaintiff. Until the expiration of one year from the date of sale the sole right to seek restitution was given by Section 7(d) of the 1946 Act not to the United States, but to the purchasers, who are the real parties in interest here. *Woods* v. *Pable,* 86 F. Supp. 464. *See also,* dissent in *Woods* v. *Richman,* 174 F(2d) 614, 616.

III

THE COMPLAINT STATES EITHER A LEGAL ACTION FOR DAMAGES FOR BREACH OF CONTRACT, IN WHICH CASE THE DEFENDANTS ARE ENTITLED TO A TRIAL BY JURY, OR SETS FORTH AN EQUITABLE CAUSE FOR RESTITUTION, IN WHICH CASE THE DEFENDANTS ARE ENTITLED TO PRESENT THEIR EQUITABLE DEFENSES.

a. The contract theory.

The Government, throughout its brief, discusses the existence of a contract between itself and the defendants. The argument is that the Government promised to give the defendants assistance in their construction effort *and gave that assistance*, and in return the defendants promised to sell their houses at not more than a fixed maximum price. Let us assume that this theory is sound.

As Expediter Creedon's testimony in the public hearings before Congress on the 1947 Act reveals, there was *a failure of consideration* on the part of the Government. The Government agreed to grant priorities assistance which would make it possible for the defendants to get the materials necessary to complete the houses, and at prices controlled as were the sales prices. Prices were decontrolled on November 8, 1946; priorities were abandoned on December 24; existing priorities were made "valueless" on March 31, 1947. These houses were not then complete and the defendants, by the Government's wilful breach of contract, were forced to complete, if at all, in an uncontrolled market in which prices rose 25% or more.

Moreover, *the "consideration"* given by the Government *was in fact valueless and illusory when given*, and gave no assistance. We refer to the evidence in the transcript which indicates that the "hunting license" was unnecessary and unhelpful, in fact, as the defendants and the witness Swanburg indicated.

As a result of this illusory promise by the Government, and the Government's later wilful breach of the "contract," the defendants incurred great expense, and more than they were led to believe would be involved by the "representations" of the Government contained in Exhibits 6 and 7. There can be no doubt, *if* there is a contract involved here which supports the Government's claim, that these defendants have a right of counterclaim against the Government for damages resulting to them from the Government's withdrawing its "assistance" before these houses were completed, and a sufficient defense to the Government's claim based on their later "breach."

And, if this is an action for damages for breach of contract, the defendants are entitled to a trial by jury, as demanded. (See, *U. S.* v. *Moore,* 95 L. ed. Adv. 431, at 434) These propositions, are, we believe, sufficiently fundamental to require no citation of authority.

If, on the other hand, this is a proceeding to compel specific performance of this contract, the same contract defenses, and other equitable defenses discussed below are relevant and admissible.

We submit this analysis of the contract theory to demonstrate its fundamental unsoundness. No action lies against the Government for amendment of law or regulation; no action is maintainable by the Government on a contract theory to punish violation of regulatory statutes, as the lower courts in this case properly ruled. The contract theory is not applicable.

b. The restitution theory:

Plaintiff's case, if there is any basis for it at all, rests upon the holding in *Porter* v. *Warner Holding Company,* 328 US 395, 66 S. Ct. 1006, 90 L. ed. 1332. In that case rent gouging under OPA

was involved, the acts of the defendant extending over several months. The Administrator sought an injunction against further violations *while the act was still in force*, and also sought to compel restitution under *s.* 205(a) of that Act, which is identical in language to the repealed section 7(a) of the Veterans' Emergency Housing Act of 1946 relied on here. The Supreme Court held that such a suit might be maintained and a decree might properly be entered, "compelling one to disgorge profits . . . acquired in violation of the" Act. But the Supreme Court squarely held that such a decree rests *on the equity powers of the court*, not on the *requirements* of the statue:

> "But where, as here, *the equitable jurisdiction* of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief . . . The problem of formulating these orders has been left to the judicial process of *adapting appropriate equitable remedies to specific situations.* * * * *The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges* . . . while giving necessary respect to the private interests involved. * * *
>
> "It follows that the District Court erred in declining, for jurisdictional reasons, to consider *whether* a restitution order was *necessary* or *proper* under the circumstances here present. *The case must therefore be remanded to that court so that it may exercise the discretion that belongs to it.*" (90 L. ed. 1338-40)

The District Courts have repeatedly recognized that the equitable power to compel restitution, as outlined in the *Warner Holding Company* case, is to be exercised to do equity, not to punish. Thus Judge Foley of the Northern District of New York refused a restraining order where there was no probability of future vio-

lations, and reduced the amount ordered repaid in restitution from the amount of the rent overcharges, $140, to $48 in *Woods* v. *Barnes*, 84 F. Supp. 155 (1949).

Similarly, in *Woods* v. *Kooker*, 83 F. Supp. 362, Judge Miller refused to decree any restitution at all, although a maximum rent violation of several hundred dollars was established. See also, *Woods* v. *Richman*, 174 F(2d) 614; *Woods* v. *Darby*, 84 F. Supp. 719, 720; *Woods* v. *Minucci*, 84 F. Supp. 535, 536; *Woods* v. *Baker*, 84 F. Supp. 339; *Woods* v. *Benson Hotel Corp.*, 81 F. Supp. 46.

While it is true that restitution has been used as "an other order" in price control and rent cases generally, we desire to point out that it is inappropriate as an *equitable* remedy in the case of sale of housing under the circumstances of this case. As is quite often stated in the cases, the design of restitution is to put the parties, as nearly as may be, in the *status quo ante*. Restitution of the excess over the maximum price to the purchaser, who is allowed to retain title to the house, does not accomplish this, when the *value* of the house is in excess of the maximum price established.

The inappropriateness of the remedy is most apparent in the *Pruitt* case discussed above. The purchaser *was not injured*—she *re-sold at a profit*, and also received a windfall from the court. This result is justifiable, if at all, not in the name of equity, but *as a penalty*, imposed by the Court for violation of a statute. Yet the *penalty* prescribed by the statute is not designed to be granted as largesse to the purchaser, but is a fine for the government whose law is violated.

Complete relief by restitution would require that the house be reconveyed to the seller, and the purchase price be restored in full to the buyer, with an adjustment for the rental benefits received by the buyer through occupancy of the premises in the

interim. This the Government does not seek, nor do the real parties in interest desire it. The comparable *Rheinberger* case, relied upon by the Government, shows a purchaser *refusing* complete relief, in order to get the penalty windfall.

c. Equity requires that no decree of restitution issue in this case.

We review certain of the facts as shown without contradiction in the record:

The defendants did not make or receive any profit on the construction and sale of these houses; on the contrary they suffered a financial loss, the extent and reason for which was excluded subject to exception. (R. 29, 38-39).

The FHA officials who approved the defendants' application set a maximum sales price of $8,350 *upon each 5-room house, without any garage or breezeway.* Mr. Baker inspected construction, found it satisfactory, noted *additions* being built not required nor prohibited by the FHA, and did not complain. Further, under regulations effective during part of the construction period price increase would have been allowed because of increases in building costs and because of additional accommodations being built, and Mr. Baker testified, in the plaintiff's case, that these defendants would have been entitled to price increases with relation to these houses for both reasons. An increase in building costs from an index figure of 410 to 485—more than 20%—was shown to have taken place while the houses were under construction; evidence of the actual building costs and the actual value of the additions and of the completed units was excluded subject to exception. (R. 29-39, 40, 21-22).

The real parties in interest, Captain Tasker and Major Buckey have received the full benefit of the additions, and for their money received not only the 5-room houses covered by the $8,350 maximum sales price, but also now own garages, breezeways, staircases, extra windows, and in Buckey's case, three extra rooms

and an extra outside entrance to the basement.

No evidence was introduced tending in any way to show that either Tasker or Buckey received any less than their money's worth; no evidence was submitted to show that the houses cannot be re-sold by them for at least what they paid for them.

No evidence was introduced showing that any profiteering was involved in these sales, or that sales at these prices were inflationary of real estate values—on the contrary, evidence to the effect that the sales were deflationary, in that the sales were below cost, was excluded subject to exception.

No credit is offered to the defendants for the excess value represented by the additions, the plaintiff on the other hand seeks recovery for several items claimed not to have been completed—no credit is given for a $1,500.00 garage, but penalty for failure to provide two laundry trays claimed to be worth $35.00 is asked.

On these facts, where does justice and equity lie?

We submit that it does not require that the present owners of these houses be given a windfall of several thousand dollars and be permitted to retain the houses with the additions and added value represented by them. There is no evidence that they have been financially damaged.

We submit that equity does not require that the defendants be penalized for innocent failure to seek warranted increases in maximum prices after repeal of the law which required their compliance with those prices.

We submit that equity does not require penalties to be imposed in 1951 to enforce compliance of a statute which was repealed in June of 1947.

Nothing will be accomplished by granting the prayer of the petition other than to penalize the defendants for the innocent sale of houses below cost, and cause the windfall enrichment of Messrs. Tasker and Buckey. No policy of the United States is

furthered, since the controls sought to be enforced have long since departed.[5]

Equity requires that no order of restitution be issued.

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[5]The Solicitor General, in March of 1951, in his Petition for a Writ of Certiorari, represented to this Court as the main Reason for Granting the Writ, that "There are about one hundred and fifty suits by the United States involving claims of some 1700 veterans, as well as an undetermined number of suits by veterans on their own behalf, pending in other courts in which the question decided by the court below is at issue. In addition, the Housing Expediter's Office is processing the claims of about two hundred veterans and expects that numerous other suits will be brought." (Petition, p. 7) He concludes: " . . . the interpretation of the court below cuts off relief from hundreds of veterans who paid over-ceiling prices without receiving concomitant increases in value." (Petition, p. 13, see Brief, p. 43).

Because these assertions appeared erroneous to counsel for defendants, the Solicitor was requested to supply detailed information upon which these representations were made. On August 10, 1951, after some exchange of correspondence, the Solicitor replied, in part, as follows:

". . . Information supplied us by the Housing Expediter, upon which we relied, apparently overstated somewhat the number of pending cases. We are now informed that, as of March 1, 1951, the Housing Expediter, had submitted to the United States Attorneys at least 106 cases in which the files definitely indicate that sales after June 30, 1947, are involved. • • • Of the 106 cases in which we have definite information, 60 had been filed on March 1, 1951.

"We are enclosing a list of those cases containing the names of the defendants, the court in which each case was pending, and the docket number where available."

Counsel for the defendants herein have endeavored to ascertain in how many of the 58 cases listed in addition to the Fortier and Duvarney cases, the issue of the Fortier case, namely, sales after June 30, 1947, is actually involved.

At least nineteen of these cases have been either settled or dismissed, the issue of the Fortier case was not at all involved in four of the cases and only incidentally involved in four of the other cases.

Only thirty-two of the listed cases are currently pending, but three of these cases do not involve sales after June 30, 1947 in any way. In all but two of the remaining cases the bulk of the alleged violations are sales prior to June 30, with a few sales after June 30, 1947 added. In one of these cases the Government "confessed" a motion to dismiss the post-June 30 charges; in at least two others the District Courts have dismissed such charges over the Government's objections.

CONCLUSION

It is well near impossible to present authorities precisely in point upon the main issue in this case, since there appear to be no decided cases in which the government has attempted to enforce statutes after their express repeal. That fact alone, we submit, is indicative of the flagrant abuse of process which we feel is

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Four of the cases listed by the Solicitor General could not be identified by Clerks of the District Courts in which they are supposedly pending. Three cases listed are criminal indictments.

This information is offered here, not merely to indicate that the Solicitor inadvertantly overstated the extent of the importance of this case on pending litigation, in advocating granting of this writ, but to attempt to point up the practical necessity of this Court's affirming the result below in order that vexatious litigation which serves no useful purpose be put at an end. In March of 1951, more than three years after the date upon which the Government contends the 1946 Housing Act and its regulations expired, and nearly four years after Congress expressly repealed the statute, the Housing Expediter and the Department of Justice are still processing proposed future law suits for sales of housing after the control act was repealed. These suits will perforce be brought more than two years after the statutory right of the purchaser to sue for his damages has expired, but for the sole purpose of securing restitution to him. This smacks of barratry.

Counsel in U. S. v. Sisk, (Civil 1064, D. C., M. D., Tenn), a case involving three sales, writes:

"In December of 1946 I represented a group of construction contractors in a hearing before the Special Committee of the United States Senate to study and survey problems of small business enterprises. . . . The hearings were begun on December 11 and I have in my files a stenographic copy of the same printed by [GPO], Washington, 1947 and bearing No. 68053. At 2:15 p. m. on Wednesday, December 18, 1946, Mr. Frank R. Creedon, Housing Expediter for the Government, had appeared and testified on page 11272 that the fixing of price ceilings had been eliminated on housing, [quoting testimony]

"Of course, I know that this doesn't have the effect of law . . . but many of my clients who were present or who heard of it, believed what the Housing Expediter had to say, that price ceilings were eliminated. In fact, it was during this hearing that it was reported that such ceilings had been eliminated by executive order."

Nevertheless, today the U. S. Attorney, not the Expediter, brings suit, and, counsel reports, objects to buyer and seller settling their dispute out of court!

represented by this case. When Congress speaks and strips an executive agency of price control powers, as was done here, we submit that it is highly improper for the Attorney-General in the name of the United States of America or the Solicitor General to thereafter harass, inconvenience, and cause expense to citizens in effort to continue to enforce penalties the authority for the imposition of which has expired. *See Joint Anti-Fascist Refugee Committee* v. *McGrath*, 95 L. ed. Adv. 556 at 567, 589.

We respectfully ask that this Court affirm the judgment of the court below or instruct the Court of Appeals to order the District Court to abate this complaint, or, in the alternative if the case is maintainable, that the Circuit Court be instructed that under the circumstances of this case as apparent by the evidence admitted and offers of proof excluded, whether any decree of restitution should issue lies in the sound equitable discretion of the District Court, and that no decree should issue unless warranted on equitable grounds.

Respectfully submitted,

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